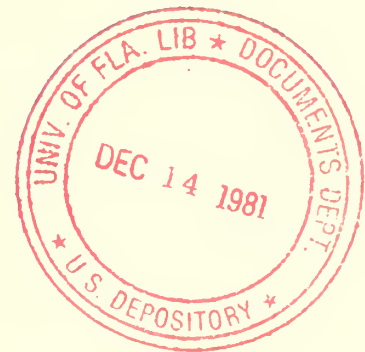


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DIGEST

The ***DIGEST*** contains summaries of recent orders issued by the United States Merit Systems Protection Board.



AUGUST 1981

Volume 1, No. 11

**UNITED STATES MERIT SYSTEMS
PROTECTION BOARD**

Washington, D.C. 20419

United States Merit Systems Protection Board

Ersa H. Poston

Vice Chair

Ronald P. Wertheim

Member

The DIGEST contains summaries of Board orders and is not intended as a substitute for professional legal counsel.

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CASE SUMMARIES:

ADVERSE ACTIONS

BUDDY F. AMELL v. GENERAL SERVICE ADMINISTRATION (Docket No. SE075209078) August 20, 1981

Appellant was removed based on charges that he had: (1) conducted personal projects during official work hours using government machinery, tools, and supplies; (2) assisted federal and nonfederal employees in constructing personal projects using government supplies, materials, and time; (3) solicited shop employees in the repair of personal small appliances using government equipment and time; (4) directed employees within the shop area to construct personal projects on government time, with government supplies and materials; (5) removed government property; and (6) promoted removal of government property by other employees for their personal use. In addition, the agency considered his past disciplinary record in removing him.

In the initial decision, the presiding official sustained the removal and considered, but rejected, appellant's argument that the penalty of removal was too harsh, noting that the penalty complied with the agency's table of penalties.

Appellant petitioned for review, challenging, among other things, the presiding official's findings sustaining the last two charges. The Board reviewed the evidence and found that neither the fifth nor the sixth charge was supported by a preponderance of the evidence and reversed the presiding official's findings sustaining these charges.

In regard to appellant's contention that the penalty of removal was too harsh, the Board cited its decision in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981), in which it held that the agency bears the burden of proof by a preponderance of the evidence that it imposed the appropriate penalty under the circumstances of the case. If upon examining the evidence, the Board finds that the penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable, it may mitigate the penalty.

The Board examined the issues of this case and found that the offenses that were sustained involved serious and repeated violations of the agency's Standards of Conduct, and the record showed that the penalty was within the range of penalties provided under the agency's table of penalties for such offenses. The Board found, in spite of the reversal of two of the six charges, that the penalty of removal was not unreasonable. Accordingly, the initial decision was affirmed as modified.

DALE BODINUS v. DEPARTMENT OF THE TREASURY (Docket No. CH07528010016) August 27, 1981

Appellant was reduced in grade from a Revenue Officer, GS-12 to Revenue Officer, GS-9. The alleged basis for the adverse action was appellant's failure to take timely action on assigned cases. In the initial decision, the presiding official sustained the agency's action, finding that: (1) the agency had established, by a preponderance of the evidence, 12 of the 13 separate specifications against appellant; (2) the agency afforded appellant time to engage in union activities and only considered the time that appellant reported working on agency business in evaluating the charge against him; (3) appellant's union activities constituted conduct protected under 5 U.S.C. §2303(b)(9), but found appellant failed to establish that the action was taken in retaliation for his representation of co-employees in agency appeal proceedings; and (4) the specifications sustained demonstrated that appellant was not adequately performing his assigned duties at the GS-12 level and his reduction in grade would promote the efficiency of the service.

Appellant petitioned for review, alleging that the presiding official erred in refusing to fully hear appellant's affirmative defenses of prohibited personnel practices, and was a result of anti-union animus. Appellant also requested attorney fees.

The agency responded, asserting: (1) that appellant's petition for review was untimely; (2) that the presiding official correctly excluded appellant's alleged evidence of anti-union animus; (3) that the

presiding official erroneously interpreted 5 U.S.C. §2302(b)(9) to encompass appellant's union representational activities in agency appeal proceedings; (4) that the reduction in grade promoted the efficiency of the service; and (5) that appellant's request for attorney fees was untimely and should not be considered.

The Office of Personnel Management (OPM) filed a petition intervening in the case and a supporting brief, asserting that reprisal for the exercise of an appeal right, and not anti-union animus, in the personnel practice prohibited by 5 U.S.C. §2303(b)(9) and contending that anti-union animus constitutes an unfair labor practice under 5 U.S.C. §7116 and, as such, is a matter outside the jurisdiction of the Board. OPM also alleged that appellant failed to timely raise at the hearing his affirmative defense of a violation of §2302(b)(11) by the agency in effecting the reduction in grade.

The Board granted the petition for review. The Board determined that appellant's petition was timely, that 5 U.S.C. §2302(b)(9) covered appellant's representational activities in agency grievance, EEO, adverse action, and other personnel proceedings, and that appellant may introduce evidence of anti-union animus to show that the agency removed him in reprisal for the exercise of appeal rights, in violation of §2302(b)(9). The Board decided that appellant had timely raised his §2302(b)(11) defense, noted the evidentiary showing that must be made to establish the defense, and found that because appellant was not permitted to present evidence and argument to support his allegations of a violation of §2302(b)(11), and of the non-bona-fides of the charge against him from which a retaliatory motive could be inferred, the case was remanded for further development of the record. On remand, the presiding official was instructed to afford the parties a new hearing and permit them to present evidence and argument concerning appellant's affirmative defenses. The Board said that appellant must also be afforded the opportunity to raise any other affirmative defenses relating to the agency's charge, and the agency must then be afforded the opportunity to further supplement its case and rebut any affirmative defenses raised by appellant.

The Board noted that appellant's request for attorney fees was premature and said that if appellant prevails on remand, and the new initial decision becomes final, he may request attorney fees pursuant to 5 CFR §1201.37.

PETER D. BORSARI v. FEDERAL AVIATION ADMINISTRATION (Docket No. NY075209162)

August 20, 1981

The Board reopened this case on October 23, 1980, and held it in abeyance, pending its decision in *Merritt v. Department of Justice*, MSPB Docket No. PH075209058 (June 8, 1981), which dealt with the provisions of the Civil Service Reform Act of 1978 governing adverse actions based on off-duty misconduct of federal employees.

The Board noted that this case raised important legal issues and questions of public policy because it involved the removal of an air traffic controller for off-duty possession and sale of marijuana, and off-duty possession of cocaine, and the record also included evidence of the off-duty use of cocaine.

The Board reviewed this case in light of its decision in *Merritt* and determined that it must be remanded for further consideration of five issues: (1) Whether appellant's off-duty conduct gives rise to a presumption of adverse effect on the efficiency of the service under the *Merritt* criteria; (2) Whether, if any presumption of adverse effect on the efficiency of the service arises in this case, such presumption has been overcome by the evidence relating to appellant's performance, and if so, then whether the agency has carried its burden of establishing that appellant's off-duty conduct affects the efficiency of the service; (3) Whether the conclusion of the presiding official sustaining the charge that appellant possessed cocaine on October 7, 1978, is supported by a preponderance of the evidence in the record; (4) Whether a preponderance of the evidence in the record supports a finding that appellant used cocaine on October 7, 1978, and if so, whether the charges articulated by the agency permit the adverse action to be sustained on the basis of any such finding; and (5) Whether off-duty use of marijuana by appellant may be inferred from his off-duty possession of marijuana in this case, and if so, whether a risk of on-duty use or effects may then be inferred from such inference of off-duty use.

Accordingly, the case was remanded for further consideration and assigned to Chief Administrative Law Judge John J. McCarthy.

CHARLES BROADHURST v. FEDERAL AVIATION ADMINISTRATION (Docket No. NY075209144)

August 26, 1981

Appellant, an Air Traffic Control Specialist, was removed for three charges of misconduct: (1) conflict of interest; soliciting money from organizations that con-

duct activities regulated by the Federal Aviation Administration (FAA); (2) use of his position as an FAA employee for personal gain; and (3) improper use of sick leave. In the initial decision, the presiding official sustained the charges but mitigated the penalty to a 60-day suspension. The agency petitioned for review, asserting that the removal penalty was proper. The petition for review was granted.

The parties stipulated that appellant and a co-worker had discovered a potentially dangerous flaw in the air traffic control system, and conceived the idea of writing a book on the subject and selling the book to the airline industry. The agency's charges concern the events of October 10, 1979, when appellant obtained sick leave and, by virtue of his position, obtained meetings with officials of two major airlines, during which he attempted unsuccessfully to induce the airline executives to purchase the book.

Upon review, the Board found that in the absence of any other mitigating factors, appellant's record of nine years of satisfactory service did not warrant a reduction in the penalty. The Board said that in view of the serious nature of appellant's misconduct, the penalty was not so excessive as to be unreasonable. Accordingly, the initial decision was affirmed in its findings of fact and reversed in its mitigation of the penalty. The penalty of removal was sustained.

LOUIS L. MILLER, JR. v. UNITED STATES POSTAL SERVICE (Docket No. CH075209109) August 27, 1981

The appellant's removal as Director, Employee and Labor Relations, Detroit Management Sectional Center, was based on three charges growing out of his involvement with a corporation—Grélin Distribution Corporation—which he and two other Postal Service employees set up. On a contract with the county social services department, they distributed food stamps, a function which the Postal Service also performed.

The first charge was that appellant's involvement in the corporation resulted from information gained by one of the other employee-partners in his official capacity. The presiding official had determined that there was indeed a violation of the Postal Service's Code of Ethical Conduct, and that the partners made a proposal to distribute food stamps, using the infor-

mation one partner had learned through his employment. The appellant argued that this information was publicly available, and that he and his partners did not rely on inside information. However, the Board sustained the presiding official's finding that appellant and his group used inside information.

The second charge was that his involvement with the corporation violated the ban on outside employment or other outside activity creating a conflict of interest, or on engaging in an activity which employment with the Postal Service gives an advantage over others not similarly employed. The Board agreed that this arrangement created a conflict of interest, or the appearance of such a conflict.

The Board sustained the third charge, that the appellant used a Postal Service employee who was on duty to do typing for the corporation.

Stating that "... we perceive a clear nexus between the efficiency of the service and a rule prohibiting the use of inside information for private gain..." the Board supported the presiding official's finding that the appellant's removal promoted the efficiency of the service, and denied the petition for review.

JOHN MIZERAK, III v. DEPARTMENT OF TRANSPORTATION (Docket No. NY075299041) August 26, 1981

Appellant was removed based on the charge of unauthorized absence. In the initial decision, the presiding official reversed the agency action on the ground that the sustained charge did not warrant removal. The agency then requested that the regional office decision be reopened and reconsidered by the former Appeals Review Board (ARB), U.S. Civil Service Commission. Since the agency action was taken before the effective date of the Civil Service Reform Act of 1978 (CSRA), the request was processed in accordance with pre-CSRA procedures under which the agency was required by 5 CFR §772.310(e)(2) to restore appellant to a temporary position pending a decision on the request by the ARB. While the request was pending, the agency terminated appellant's temporary appointment, and he again appealed to the Board. In an initial decision, the presiding official determined that since appellant's current position was temporary in nature, he was not an employee who could appeal to the Merit Systems Protection Board. He then dismissed the appeal without reaching the merits of the original termination action.

Appellant then filed a petition for review of that decision, alleging that the agency had no right to terminate his temporary appointment while the agency's request to the ARB for reopening and reconsideration was pending. He further alleged that if the second termination was allowed to stand, the agency had effectively circumvented the regional office reversal of the initial removal.

The Board said that although filed as a petition for review, this case actually raised the issue of the Board's enforcement authority. Under 5 U.S.C. §1104 (a)(5) and (b)(4)(1977), the former Civil Service Commission had the authority to enforce and take final action on all matters appealable to it. Pursuant to the Savings Provision of the Civil Service Reform Act and the implementing regulation, 5 CFR §1201.191(1979), the Board retained that authority in cases arising before the effective date of the CSRA.

The Board found that none of the charges against appellant justified his separation from the temporary appointment. The Board found that the record disclosed that the agency failed to comply with the regional office decision reversing the first removal action and with 5 CFR §772.310(e)(2), when it separated appellant from his temporary appointment for insubstantial reasons. Accordingly, the Board vacated the initial decision and ordered the cancellation of the termination action.

MITCHELL L. MOSCHNER v. U.S. POSTAL SERVICE
(Docket No. SE075209070) August 26, 1981

Appellant was removed from his position as Postmaster for: (1) failure to follow established procedures which resulted in the misappropriation of postal funds; (2) conversion of postal funds in the amount of \$17; and (3) violations of the agency's standards of conduct concerning the discharge of duties conscientiously and effectively and the violation of sections of the Code of Ethical Conduct and the Employee and Labor Relations Manual. In the initial decision, the presiding official sustained only a portion of charge 1 and concluded that the agency rendered unlike penalties for like offenses, reversed the removal, and ordered that the appropriate discipline was a letter of warning.

The agency petitioned for review followed by brief, arguing that: (1) the agency was prejudiced by appellant's failure to file a timely appeal of his removal; (2) the presiding official's findings were not supported by the evidence; (3) the Board should reverse the credibility findings of the presiding official; and (4) the presiding official erred in concluding that the agency had assessed unlike penalties for like offenses.

The Board reviewed the entire record in light of the agency's contentions that the presiding official failed to give proper weight to the evidence, but found no reason to disturb the presiding official's findings. The Board granted the petition, however, to review the agency's timeliness argument and its contention that the presiding official erred in mitigating the penalty based on her finding of disparate treatment.

The Board reviewed the events surrounding the timeliness issue and found that the Postal Service received ample notice of the issue and had an opportunity to respond. The Board said that any lack of awareness of the appeal was due to internal miscommunication on the part of the Postal Service and not to any omission of service or other acts of the Board's regional office. The Board found further that even if the agency had responded, its arguments did not amount to a showing of substantial prejudice. The Board cited *Hilberto Alonzo v. Department of the Air Force*, Docket No. DA075209013 (November 24, 1980), in which it discussed factors to be considered in deciding whether an agency has been substantially prejudiced by an untimely filing.

The Board reviewed the agency's contention that the presiding official erred in concluding that the agency had assessed unlike penalties for like offenses, and found that the offense in the case cited by the agency was distinguishable from the offense in this case. The Board found that the presiding official erred in finding that appellant had to be treated in the same manner, but said that his finding did not necessarily dictate a conclusion that the ultimate disposition of the case was erroneous. The Board cited its decision in *Douglas v. Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981) in which it said that there are other factors upon which the penalty can be mitigated. The Board said that the relevant factors in this case were: (1) the seriousness of appellant's offense; (2) his status as Postmaster; (3) his length of service; (4) the adequacy of alternate sanctions to deter such conduct in the future; and (5) the impact of the offense on the reputation of the agency.

Under the circumstances of this case the Board found that a reduction in grade of appellant to the next lower grade nonsupervisory position which he could be expected to perform in a fully satisfactory manner free of managerial responsibilities was within "the parameters of reasonableness" as set forth in *Douglas*. Accordingly, the initial decision was affirmed as modified and remanded for further processing and adjudication. On remand, the presiding official was instructed to afford the parties the opportunity to introduce additional evidence on the question of whether there is available a lower graded nonsupervisory position which appellant is qualified to fill and

in which he could be expected to perform in a fully satisfactory manner.

BRUCE M. RISNER v. FEDERAL AVIATION ADMINISTRATION (Docket No. SL075209067)
August 25, 1981

Appellant was removed for: (1) unsuitable on-duty conduct; (2) refusal to follow orders; and (3) insubordination. Appellant was repeatedly requested to cease certain conduct which the agency perceived as bizarre, and he was ordered to attend a fitness-for-duty examination, which he failed to do.

In the initial decision, the presiding official affirmed the removal. In his petition for review, appellant contended that the removal chills his first amendment rights including any whistle blowing of alleged violations by his superiors; that the language in 5 U.S.C. 8347(c) violates his sixth and seventh amendment rights; and that the presiding official erroneously failed to give weight to the findings of appellant's physician.

The Board discussed the adequacy of the initial decision, and found that it did not meet the requirements of 5 CFR 1201.111(b)(1), which requires that an initial decision contain findings of fact and conclusions as well as the reasons or bases therefor, upon all material issues of fact and law presented in the record. Accordingly, the Board reopened the case on its own motion to undertake review of the six specifications under reasons 1 and 2 which were found to be supported by a preponderance of the evidence.

The Board discussed the specifications and found reason 1 and reason 2 sustained by a preponderance of the evidence. The Board found no support for appellant's claims regarding his first amendment rights and said that appellant's claims regarding his sixth and seventh amendment rights were unclear because 5 U.S.C. 8347(c), which was cited by appellant, had no relevance to his case. The Board found that the agency proved the facts which formed the basis for the action against the appellant by a preponderance of the evidence. The Board said that the agency met its burden of proving that the action against appellant promoted the efficiency of the service. The Board found that by removing appellant, the agency acted properly to assure the safety and integrity of its mission, employees, and facility, and his removal promoted the efficiency of the service.

The initial decision was affirmed as modified.

JOSEPH J. RUZEK v. GENERAL SERVICES ADMINISTRATION (Docket No. SL075209017),
August 20, 1981

The appellant said that alcoholism was a causative factor in his disobedience to led to his removal. The presiding official affirmed the removal. The Board held that since agency officials had not been aware of the alcoholism or offered rehabilitative help before starting the action, appellant should have another chance as required by 29 CFR §1613.70(a).

In responding to the proposed removal notice, the appellant, a guard at the Herbert Hoover Library, admitted sleeping on duty, but said it was related to his alcoholism, and, maintaining that the problem was now under control, he asked for another chance. His insurance agent also pled on his behalf. However, despite 17 years service, the agency dismissed him, pointing to two past instances of disciplinary action.

Appellant's former supervisor had testified that he had told appellant the agency would be willing to help with any problems, but that he was unaware of a problem of alcoholism, although he had smelled alcohol on the appellant's breath during the second incident of sleeping on duty. The presiding official's reasoning was that the appellant was indeed an alcoholic, but that the agency had discharged its duties under federal law and its own handbook by indicating to the appellant that help was available. However, the appellant's petition for review of the initial decision maintained that the presiding official had misinterpreted federal law. The Board granted the petition.

The Board's order pointed to 5 U.S.C. §2302(b)(1) which lists discrimination on the basis of a handicapping condition as a prohibited personnel practice, and to other Federal Government and judicial determinations that alcohol and drug abuse are handicapping conditions. It found that, regarding federal employment, alcoholism constitutes a handicapping condition. The Board noted that under 29 CFR §1613.704(a) agencies are to make a "reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program."

Further, the Board pointed to provisions for dealing with federal employees who are alcoholics, such as the Alcohol Abuse Act which mandates treatment program within the government, and consequent implementing rules in the *Federal Personnel Manual*. The

FPM requires that employees whose use of drugs or alcohol interferes with their job performance be offered a chance at rehabilitation before being disciplined. In offering the help, the Board said, the supervisor must do more than simply suggest an employee take part in a rehabilitation program, but must make the employee aware that the supervisor suspects the problem, and that he recommends employee participation in a particular program.

In this case, the appellant showed that he was a "qualified handicapped employee," and that his supervisor did not counsel him as required, or was even aware of the alcoholism until the appellant responded to the removal proposal. It said the agency should have cancelled the proposed removal, and given the appellant another chance. Therefore, it found handicap discrimination, and concluded that the removal could not be sustained because the agency had committed the prohibited personnel practice of handicap discrimination.

The initial decision was reversed, and the agency ordered to cancel its removal action.

HERBERT F. SEARS v. DEPARTMENT OF THE NAVY
(Docket No. BN075299016) August 19, 1981

Appellant, a purchasing agent, was removed from his position for the unauthorized removal of government property valued at less than \$100. In appellant's 25 years of service, this was the first disciplinary action taken against him. In his petition for review, appellant contended that the agency erred in not informing him of his rights under 5 U.S.C. 7114(a)(3) and argued that his penalty should be mitigated.

On January 12, 1979, one day after the Civil Service Reform Act of 1978 became effective, appellant was interrogated and informed of his right to remain silent, that any statement he made could be used as evidence against him in a court of law, that he had a right to have a lawyer present during the interview, and that he was free to leave or terminate the interview at any time. Appellant signed a printed form waiver of his rights and executed a statement admitting the removal of practically all the property involved. Appellant was not informed of his rights under §7114(a) of the Reform Act at the time of the interview. (The agency did inform all employees of their rights under the Act on January 22, in an employee newsletter.) Seven weeks after the January 12 interview, appellant met with his unit chief and a union observer for the report of the agency's investigation, and four days later, the agency proposed appellant's removal.

Appellant contended that the agency's failure to inform him of his right to have a union representative present at the January 12 meeting was a violation of 5 U.S.C. 7114(a) and required suppression of his statement and the statements of other employee's subsequent to January 12. The agency responded, saying that it is the employee's obligation to request union representation. The agency said that its notification to employees in the newsletter on January 22 was timely, and it fulfilled the requirement that agencies notify their employees annually of their rights. The agency further stated that the warning actually given appellant provided a greater degree of protection than was available under the Act. The presiding official held in favor of the agency in the initial decision, finding that 5 U.S.C. 7114(a)(2)(B) did not require that an employee be informed at the time of interrogation of the right to have a union representative present, and that the *Miranda*-type warnings given to appellant were more comprehensive and provided more due process than the rights under section 7114(a)(2)(B).

The Board discussed the legislative history of 5 U.S.C. 7114 and the difference between the rights afforded under that section and the rights under *Miranda*. The Board found no error on the part of the agency and no infringement of appellant's rights in the conduct of the investigation. In regard to the issue of mitigation, the Board found that the agency was justified in concluding that it could not trust appellant, and that his conduct would severely impair his usefulness in any position with the agency. Accordingly, the petition for review was denied.

LAWRENCE A. WILD v. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
(Docket No. CH075209003) August 27, 1981

In the initial decision, the presiding official agreed with the agency's removal of the appellant who was an appraiser with HUD. The presiding official sustained the charge that appellant violated the agency's Standards of Conduct by not avoiding an "involvement" in matters which stained the agency's public image. He reversed the other charges: Violating another of the agency's Standards of Conduct rules and falsifying official documents.

The appellant's petition for review claimed discrimination based on marital status, and said that alleged off-duty misconduct did not affect his job performance.

The facts in the case were that the appellant's wife had acquired apartment buildings which less than a year later were vacant, uninhabitable, and in substantial violation of the city's building code. The city took

actions against the appellant's wife. A community organization formally complained with his agency, whereupon the agency told appellant to make a good faith effort to upgrade the properties or to dispose of them. The county housing court ordered appellant to repair the buildings.

A news article headlined "HUD Employee Told to Repair Buildings" told of the housing court proceedings against appellant. When the housing court judged the buildings attractive nuisances and issued demolition decrees, the agency began removal proceedings against appellant. The presiding official concluded that appellant had a positive responsibility in light of his employer's goals and missions, to correct the housing, or to dispose of it. He said that the bad publicity had caused the agency to lose public confidence.

Petitioning for review, the appellant said that the removal was a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(1)(E), claiming discrimination because of his wife's ownership of commercial real estate. The Board found his contention without merit. It pointed to the hearing record which showed the appellant's active role in handling the properties.

The Board also found appellant's two other arguments without merit: That the agency violated the section barring discrimination "on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others," and that his wife's interest in the properties was not relevant to his job performance standards.

The Board found appellant's conduct sufficiently egregious to give rise to a presumption that it affected the efficiency of the service.

Also without merit, the Board said, was the appellant's assertion that the agency had improperly charged him with a violation of 24 CFR §0.735-201. He said this section of agency regulations was unconstitutionally vague, overbroad and could not serve as a basis for his removal.

As to the appellant's argument that the presiding official erred in concluding that he had no authority to review the propriety of the agency's penalty, the presiding official never held that: He had decided that removal was appropriate for the charge which he sustained.

The Board noted that it recently determined that it has authority to review the appropriateness of an agency penalty and reduce the penalty in case of

mitigating factors. See *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981). It said the presiding official did not err in affirming the removal.

The Board found that appellant's conduct was serious, that the penalty of removal was not unreasonable, and denied the petition for review.

HIRONOBU YAMAGUCHI v. DEPARTMENT OF THE NAVY (Docket No. SF075209080) August 31, 1981

Appellant was removed based on the charge of indebtedness. The appellant had failed to repay loans of \$2,500, \$3,500, and \$5,000 from three employees under his supervision and a total of \$14,287 from four other agency employees. Appellant acknowledged his debts, but asked that the penalty of removal be mitigated. In the initial decision, the presiding official affirmed appellant's removal, refusing to mitigate the penalty on the grounds that he lacked authority. The appellant petitioned for review, asserting that the presiding official erred in finding that removal for indebtedness promoted the efficiency of the service, and in failing to review voluntarily the agency's records of similar adverse actions to determine whether appellant's removal constituted disparate treatment.

The Board granted the petition for review under 5 U.S.C. §7701(e)(1) and 5 CFR §1201.115. The Board, in its decision in *Monterosso v. Department of the Treasury*, MSPB Docket No. BN075209023 at 5 (June 12, 1981), noted the public trend away from imposing on federal agencies the responsibility to bring disciplinary pressure to bear on employees who fail to pay their just debts, and held that an "agency may effect an adverse action against an employee (on that basis) only when it can establish that the employee's non-payment of just debts has or will have a deleterious effect on that employee's performance or on the ability of the agency to perform its assigned mission." The Board said that the presiding official erred in failing to make a finding on this issue.

In regard to appellant's contention that the presiding official erred in failing to review agency records of similar situations, the Board said that since appellant made no attempt to obtain copies of any relevant agency actions, it found no lapse of duty by the presiding official in that regard and no basis for assuming that appellant had been penalized more severely than other employees. The Board said that it was unlikely that agency records would include any truly equivalent offense.

The Board said that appellant's conduct constituted not merely indebtedness but a severe abuse of his position as a supervisor, and properly rendered him untrustworthy in the eyes of his fellow employees. The Board noted that appellant created an image of untrustworthiness and could not reasonably be expected to function effectively in another, non-supervisory position if he were demoted. Accordingly, the initial decision was affirmed as modified, and appellant's removal was sustained.

PARTICULAR EMPLOYMENT CATEGORIES

JOHN D. CORBETT v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Docket No. NY315H19001)
August 20, 1981

In terminating employment of the appellant, a probationary employee, the agency alleged that in his employment application, he had intentionally not fully answered that he had five prior convictions, and had instead responded misleadingly. The presiding official held that 5 CFR §315.806, which provides limited appeal rights for probationary employees terminated for pre-employment reasons, was carried out incorrectly, and that the Board had jurisdiction, and sustained the agency action.

The Board reopened the case on its own motion, asking the parties to address: (a) whether it may decide a probationary employee's appeal from termination for pre-appointment reasons when the appeal does not allege that the action was based on discrimination referred to in 5 CFR §315.806(b) or that the termination was procedurally improper; and (b) if the answer is no, whether the disparity between the appeal rights provided under 5 CFR §315.806(a) and those provided under 5 CFR §731.401 is lawful.

After issuance of the reopening order, the appellant filed a petition for review, contending that the agency had not proven intentional falsification, and that he had not been given full and fair opportunity to respond. The Office of Personnel Management (OPM) responded to the Board's reopening order, and the appellant responded to OPM's brief, and submitted further argument.

The Board noted that a probationary employee is not an "employee" under Chapter 75 of Title 5 of the United States Code, and has no statutory right to appeal adverse actions. However, OPM has extended certain rights to probationary employees. Such employees may appeal on procedural grounds, but the Board is not allowed to review the merits of the case.

Nevertheless, the presiding official held that the Board could review the merits of this case based on his comparison of rights granted applicants and other probationary employees under 5 CFR §731.401 with their rights under 5 CFR §315.806. He reasoned that since applicants and probationary employees who were determined unsuitable under 5 CFR §731.201 *et seq.*, were entitled to contest the merits of the determination in an appeal to the Board, it would be a denial of equal protection to deny appellant the same right under 5 CFR §315.806. The Board disagreed with the presiding official's reasoning that if he adhered to this latter provision he would be committing a prohibited personnel practice, violating the merit system principle which states that employees are to receive fair and equitable treatment in personnel actions with proper regard for their constitutional rights.

Among the points the Board made was the deciding employee or applicant appeals is not a "personnel action," and therefore could not be a prohibited personnel practice. Further, it said the presiding official did not have the authority to declare OPM regulations invalidly implemented. It said that the Board's appellate jurisdiction is expressly confined to actions appealable to the Board, and that it had no authority to accept jurisdiction where none exists. Even where an employee is dismissed for pre-employment reasons in a way that raises constitutional issues of "property" and "liberty," the Board cannot consider such issues if no law, rule, or regulation gives it jurisdiction. See *Smith v. Department of the Navy*, MSPB Order No. SF075299010 (November 6, 1980).

The Board concluded that its jurisdiction in this case was limited to the procedural requirements of 5 CFR §315.805, and that the issue of the constitutionality of 5 CFR §315.806(c) could not be considered since it was not within the Board's jurisdiction. The initial decision was affirmed as modified, and the agency action was sustained.

Regarding the appellant's claim of inadequate time to respond to the proposed removal notice, the Board said appellant brought forward no new evidence, nor did he allege that the presiding official's decision was based on an erroneous interpretation of statute. In view of its findings on jurisdiction, the Board declared appellant's other arguments moot and denied the petition for review.

PERFORMANCE RELATED ACTIONS

ELLIOT ROSENBERG v. COMMODITY FUTURES TRADING COMMISSION

(Docket No. NY531D8010048) August 31, 1981

In an initial decision, the presiding official reversed the agency's action in denying appellant his within-grade salary increase, finding that the agency had not provided any method to evaluate the technical evidence presented and because the agency had not treated appellant fairly in making its negative acceptable level of competence (ALOC) determination. The agency petitioned for review, asserting, among other things, that the initial decision does not comport with the requirements of 5 CFR §1201.111 and completely ignores the evidence presented by the agency.

The Board granted the petition for review. In the initial decision, the presiding official admitted that she was unable to determine if the ALOC determination was justified because the agency had not provided expert guidance to explain the evidence presented. The Board found that the presiding official failed to present her "findings of fact and conclusions, as well as the bases therefor, upon all material issues of law and fact presented on the record," as required by 5 CFR §1201.111(b)(1). The Board noted that it had made clear in *Lewis v. United States Marine Corps*, MSPB Order No. SL075299008 (October 2, 1980) that in cases decided without a hearing, the interests of justice require that a presiding official monitor the submissions closely and request additional evidence when appropriate. The Board remanded the case, instructing the presiding official to determine which technical issues are material to a determination in this case and request the parties to address these issues.

REMEDIES

PATSY VANDIVER v. GENERAL ACCOUNTING OFFICE

(Docket No. DC075299062) August 27, 1981

This case came before the Board on appellant's petition for review of an addendum decision awarding her attorney fees.

Appellant resigned from her position in April 1979. The Board held that appellant's resignation had been coerced and that the involuntary resignation thus was tantamount to an adverse action. The Board reversed the adverse action, finding that the agency committed harmful procedural error by failing to use appropriate adverse action procedures to remove her.

In an addendum decision, the presiding official found that the agency's action was taken in bad faith and that attorney fees were warranted in the interest of justice. *Allen v. U.S. Postal Service*, 2 MSPB 582. The presiding official found that appellant had contractually agreed, regardless of the outcome of her appeal, to pay her attorney his fixed hourly rate multiplied by the number of hours of work performed, and found that appellant was not entitled to an award of the amount of fees due under the contingency provision of the agreement. (The provision provided that appellant's attorney would be awarded a contingent fee based on one-third of the amount recovered by the appellant in back pay.) The presiding official ordered the agency to pay appellant \$3825 in attorney fees.

In her petition for review, appellant argued that although the award was reasonable, the award should be increased to \$12,408.59 (one-third of her back-pay award). Appellant contended that the presiding official failed to consider the contingent nature of her case and failed to take into account her attorney's vigorous and effective representation of her.

The Board agreed with the presiding official's finding that appellant was only entitled to attorney fees based on an hourly rate. The petition for review was denied.

RETIREMENT

RUSSELL W. MILLER, JR. v. OFFICE OF PERSONNEL MANAGEMENT

(Docket No. CH831L8010103)

August 25, 1981

Appellant, a mailhandler, applied for disability retirement, which was denied by the Office of Personnel Management (OPM). The decision was upheld upon reconsideration by OPM, and appellant appealed the reconsideration decision to the Board's Chicago Regional Office. After affording appellant a hearing, the presiding official issued the initial decision reversing OPM's denial of appellant's application. The presiding official did not, however, determine the merits of the appeal, but instead, ruled for the appellant solely as a sanction against OPM. OPM then filed a petition for review, contending that the initial decision was based on erroneous interpretation of law. The petition for review was granted.

OPM argued that: (1) appellant suffered no harm by its failure to specifically respond to appellant's petition for appeal; (2) the presiding official recklessly disregarded the truth in finding that OPM failed to respond to his order to submit medical documents which appellant had stated were missing from OPM's files; (3) OPM was not required to be represented at the hearing and any technical non-compliance with §1201.25(a)(6) was harmless; and (4) to allow disability retirement benefits in this case solely as a sanction against OPM would result in an unlawful default judgment against the United States.

The Board found that OPM substantially complied with the requirements of 5 CFR §1201.25(a)(3) and appellant did not show that he was prejudiced by OPM's response to the petition for appeal. The Board said that OPM's arguments that the presiding official

recklessly disregarded the truth regarding the missing medical records were without merit, but that the presiding official committed error by failing to serve appellant with certain *ex parte* communication on the matter. The Board noted that OPM's decision not to be represented in this case was not a violation of the Board's regulations. Finally, the Board found to allow appellant disability retirement benefits solely as a sanction against OPM would result in an unlawful default judgment against the United States, and said that the presiding official erred in his decision.

The Board found, based on the medical evidence and appellant's testimony, that appellant was totally disabled as defined in 5 U.S.C. §8331(6). Accordingly, the initial decision was affirmed as modified. OPM was ordered to grant appellant disability retirement benefits.

OTHER AUGUST ISSUANCES

THE FOLLOWING PETITIONS FOR REVIEW WERE DENIED:

BECKSTEAD, Riley M. v. United States Postal Service (Docket No. DE34438110157)
BLAKE, Catherine v. Department of Health and Human Services (Docket No. PH531D8110071)
BRADFISH, Patricia A. v. Office of Personnel Management (Docket No. CH831L09019)
BUTLER, Audrey J. v. Department of Health and Human Services (Docket No. PH07528010414)
CABRAL, Roger v. U.S. Department of Health and Human Services, Social Security Administration (Docket No. PH07528010331)
CAMPBELL, Kenneth W. v. Tennessee Valley Authority (Docket No. AT07528010296)
CLAY, Johnny, Jr. v. U.S. Postal Service (Docket No. AT07528110199)
COPE, Francis M. v. Department of the Navy (Docket No. SF07528010155)
DELEON, Guadalupe v. United States Postal Service (Docket No. DA07528010282)
DOUGLAS, Larry R. v. Department of Treasury (Docket No. DC075209163)
FAUSTO, Joseph A. v. Fish and Wildlife Service (Docket No. PH07528110227)
FRAZIER, Beatrix E. v. Office of Personnel Management (Docket No. PH831L8010289)
GELUZ, Honorio, Sr. v. Department of the Navy (Docket No. SF03538010090)
GIBSON, Fharis v. Department of Justice (Docket No. AT075299025)
GRIFFIN, Earline G. v. Department of the Navy (Docket No. PH07528110254)
GRISSOM, John W. v. Tennessee Valley Authority (Docket No. AT07528010284)
KELSEY, Allegro v. Government of the District of Columbia (Docket No. DC07528010051)
KING, John E. v. Department of the Air Force (Docket No. AT07528110048)
LANCSEK, Stephen J. v. Office of Personnel Management (Docket No. PH831L8010034)
LERNER, Albert L. v. Department of the Interior (Docket No. SF03518110174)
McANALLEN, Joseph v. Office of Personnel Management (Docket No. AT831L8110071)
MITCHELL, James D. v. U.S. Department of the Air Force (Docket No. DA07528010291)
MOODY, Evie Sue v. Department of the Army (Docket No. CH07528110025)
MORGAN, Calvin v. Office of Personnel Management (Docket No. DA831L8110071)

MOYERS, James V. v. United States Postal Service (Docket No. DA34438110227)
PARKER, Nick C. v. Department of the Interior (Docket No. AT34438110164)
PENDER, Juvondi v. U.S. Postal Service (Docket No. NY07528010126)
PETTITO, Donald v. Office of Personnel Management (Docket No. BN831L8110010)
PHILLIP, Melvin v. Veterans Administration (Docket No. NY07528110118)
QUICK, William W. v. United States Postal Service (Docket No. AT075209135ADD)
RASHEED, Frank B. v. Department of the Air Force (Docket No. DA07528110083)
RICHARDSON, Ralph L. v. U.S. Postal Service (Docket No. NY07528110033)
SAXTON, George C. v. Government of the District of Columbia (Docket No. DC03518010332)
SHAH, Dinesh M. v. General Service Administration (Docket No. DA315H8010018)
SOFIO, Salvatrice v. Internal Revenue Service (Docket No. CH07528110002)
SPEICHER, Walter Allen v. Veterans Administration (Docket No. PH07528010429)
SWYERS, Elwood v. Defense Logistics Agency (Docket No. CH03518110011)
TAYLOR, Mildred E. v. Department of State (Docket No. DC07528110218)
WILLIAMS, Nancy M. v. Office of Personnel Management (Docket No. PH831L8010352)
WOODS, Elbert E. v. U.S. Postal Service (Docket No. AT07528110227)
ZAMBOTTI, Raymond R. v. Department of Transportation (Docket No. PH075209065)

THE FOLLOWING CASES WERE REMANDED TO THE REGIONAL OFFICES:

AIELLO, Caroline C. v. Office of Personnel Management (Docket No. CH831L8010202)
AYCOCK, Jesse W. v. Office of Personnel Management (Docket No. AT831L09001)
CONDAXIS, James P. v. U.S. Department of Commerce (Docket No. DC07528110405)
DECK, Kenneth R. v. Department of the Army (Docket No. AT035199050)
GOLDEN, Portia v. Department of the Navy (Docket No. AT075299017)
JOHNSON, Michael A. v. Government of the District of Columbia (Docket No. DC07528110252)

JOLLY, Helen K. v. Office of Personnel Management (Docket No. AT831L8010278)
MCGOWAN, Clyde W. v. International Communication Agency (Docket No. DC075299084)
PAOLERA, Margaret M. v. Office of Personnel Management (Docket No. SF831L8010165)
VALERINO, Donald M. v. Department of Health and Human Services (Docket No. DC075209005)
YOHANNES, Sharon S. v. Public Schools of the District of Columbia (Docket No. DC03518110318)

THE FOLLOWING CASE WAS REMANDED TO THE OFFICE OF PERSONNEL MANAGEMENT:

ARMSTRONG, George B. v. Office of Personnel Management (Docket No. AT831L09024)

THE FOLLOWING CASE WAS REOPENED:

MORRIS, William R., Appeal of under 5 C.F.R. Part 300A (1978) (Docket No. SF300A00001)

THE FOLLOWING REQUEST TO REOPEN A CASE WAS DENIED:

STEVENS, Carrington W. v. U.S. Department of the Air Force (Docket No. SE31580005)

A REQUEST TO REVIEW AND RECONSIDER THE INITIAL DECISION OF THE PRESIDING OFFICIAL WAS DENIED IN THE FOLLOWING CASE:

COOPER, Foster W. v. Office of Personnel Management (Docket No. SE831L8110033)

THE FOLLOWING INITIAL DECISIONS WERE AFFIRMED OR AFFIRMED AS MODIFIED:

EDWARDS, Carl L. (Docket No. CH07528010170) and Gail W. Smith (Docket No. CH07528010169) v. Veterans Administration
LOTT, Barney v. Department of the Navy (Docket No. NY07528010101)
LUNNY, John J. v. Veterans Administration (Docket No. NY075209168)
POWERS, William L. v. Department of Health and Human Services (Docket No. DC07528110022)
SMITH, Gail W. v. Veterans Administration (SEE Edwards)
WEAVER, Curtis L. v. Department of the Army (Docket No. SL043299002)

THE FOLLOWING INITIAL DECISIONS WERE REVERSED:

BAKER, Joseph v. Office of Personnel Management (Docket No. PH831L8010399)

BATTLE, Neomia P. v. Office of Personnel Management (Docket No. AT831L09031)
COOPER, Jeffrey L. v. Department of the Treasury (Docket No. PH075209068)
COTNEY, Ronald B. v. Office of Personnel Management (Docket No. AT831L09011)
DEYOUNG, James K. v. United States Postal Service (Docket No. CH075299037)
FELTON, Alvin v. Department of Labor (Docket No. CH07528010005)
FORDE, John A. v. Office of Personnel Management (Docket No. NY831L09008)
HARRIS, Elizabeth v. Office of Personnel Management (Docket NO. PH831L8010255)
MCGRAW, Thomas F. v. Veterans Administration (Docket No. NY075209004)
OLIVER, James v. Office of Personnel Management (Docket No. CH831L09008)
REITMEYER, Mary L. v. Office of Personnel Management (Docket NO. PH08318110050)
SMITH, Lewis A. v. Department of the Air Force (Docket No. AT035109027)

IN THE FOLLOWING CASE THE INITIAL DECISION WAS VACATED AND THE AGENCY ACTION WAS SUSTAINED:

MASCOL, Adolfo v. Department of the Navy (Docket No. NY07528010117)

IN THE FOLLOWING CASE THE INITIAL DECISION WAS VACATED AND THE AGENCY ACTION WAS REVERSED:

AFFSA, Fred J. v. Department of Agriculture (Docket No. BN07528010069)

IN THE FOLLOWING CASE, THE INITIAL DECISION WAS VACATED WITH RESPECT TO THE AGENCY'S REDETERMINATION DECISION DENYING APPELLANT'S WITHIN-GRADE INCREASE AND AFFIRMED IN ALL OTHER RESPECTS:

MAIMONE, Frank C. v. Department of the Navy (Docket No. PH531D8010145)

THE FOLLOWING CASE, THE INITIAL DECISION WAS VACATED AND THE OFFICE OF PERSONNEL MANAGEMENT'S RECONSIDERATION DECISION WAS REVERSED:

ALLEN, Daniel v. Office of Personnel Management (Docket No. DC831L8010213)

THE FOLLOWING DECISION WAS AFFIRMED IN PART AND REVERSED IN PART:

DEERY, Theodore J. v. U.S. Department of the Navy (Docket No. PH075209090)

THE PETITION FOR REVIEW IN THE FOLLOWING CASE WAS DISMISSED WITH PREJUDICE:

MELCHIONNO, Richard D. v. Defense Mapping Agency (Docket No. SL315H09001)

THE INITIAL DECISION WAS VACATED IN THE FOLLOWING CASE:

DIENER, Dina v. Office of Personnel Management (Docket No. NY831L09001)

IN THE FOLLOWING CASE, THE OFFICE OF PERSONNEL MANAGEMENT WAS DIRECTED TO PROVIDE INFORMATION TO THE BOARD:

NATIONAL TREASURY EMPLOYEES UNION, Petitioner v. Donald J. Devine, Director Office of Personnel Management, Respondent (Docket No. HQ12050006)

THE FOLLOWING CASE WAS ASSIGNED TO THE OFFICE OF THE ADMINISTRATIVE LAW JUDGES:

HICKLER, David H. v. Office of Personnel Management (Docket No. DC08318110731)
SPECIAL COUNSEL v. Small Business Administration (Docket No. HQ12068110006)

A MOTION FOR A STAY WAS GRANTED IN THE FOLLOWING PROCEEDING:

IN RE DISCLOSURE OF INFORMATION, 5 CFR 735.206 and 5 CFR 1001.735.208

THE FOLLOWING CASE WAS FORWARDED TO THE REGIONAL OFFICE FOR PROCESSING:

JACKSON, Walter L. v. Department of the Army (Docket No. CH03518010195)

IN THE FOLLOWING CASE, THE PETITION FOR REVIEW WAS DENIED, BUT THE BOARD REOPENED AND AMENDED THE CASE:

MCNEIL, Clarence v. Veterans Administration (Docket No. BN07528110002)

ERRATA WERE ISSUED IN THE FOLLOWING CASE:

ARNONE, Betty v. Office of Personnel Management (Docket No. DE831L8010091)
GODBOLT, Larry E. v. Department of the Army (Docket No. DA075209184)

HURLEY, Daniel J. v. Department of Health and Human Services (Docket No. NY0752S8110046)
PENDER Juvondi v. U.S. Postal Service (Docket No. NY07528010126)
RAMOS, Alejandrino v. Office of Personnel Management (Docket No. RB08317800252)
WOODS, Elbert E. v. U.S. Postal Service (Docket No. AT07528110224)

THE FOLLOWING EXTENSIONS OF TIME WERE GRANTED:

CHILES, Willie H. v. U.S. Department of Agriculture (Docket No. DA03538110332)
CRUZ, Natalio v. Department of the Air Force (Docket No. DA07528110321)
DEAL, James D. v. Office of Personnel Management (Docket No. DC831L8110440)
DEUTSCH, Stephen B. v. Department of Defense Dependent Schools, Seoul American High (Docket No. SF07528010434)
DOHERTY, Edward M. v. Department of Transportation (Docket No. NY07528110158)
ELLINGSON, James v. Department of the Treasury, Internal Revenue Service (Docket No. CH07528110312)
GANDY, Allen J. v. U.S. Department of Housing and Urban Development (Docket No. SF07528010397)
GORDON, Gerald v. Veterans Administration (Docket No. NY531D8110151)
MENDELSON, Michael I. v. Federal Communications Commission (Docket No. DC07528110489)
MUNISTERI, Joseph v. Department of the Army (Docket No. NY531D8110178)
NOLAND, Harold E. v. Tennessee Valley Authority (Docket No. AT03518110498)
OMMAYA, Ayub K. v. National Institute of Health, Department of Health and Human Services (Docket No. DC531D8010316)
QUIRINDONGO, John v. U.S. Postal Service (Docket No. NY07528110219)
RICHARDSON, Virginia v. Department of Health and Human Services (Docket No. AT07528110323)
SUNDERLAND, Marshall L. v. Veterans Administration (Docket No. AT07528110538)
SWEET, Cephas S. v. Department of Health and Human Services (Docket No. PH7528110342)

THE FOLLOWING EXTENSIONS OF TIME WERE DENIED:

DIEFENBACH, Williard E. v. Government of the District of Columbia (Docket No. DC03518110441)
LEWIS, Anthony v. U.S. Department of Justice (Docket No. DC07528110521)

FOR YOUR INFORMATION:

DIGEST

The *DIGEST* is a monthly publication containing summaries of Board orders and a list of other Board orders and issuances. It is available from the Superintendent of Documents on either a subscription or single issue basis. The price for a subscription is \$13 per year; (\$16.25 outside the United States). Single issues are also available at a price of \$1.75 per issue; (\$2.25 outside the United States). Please address subscription or purchase inquiries to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

PUBLISHED BOARD DECISIONS AND INDEX

Decisions of the United States Merit Systems Protection Board (Volumes I and II) and *Index to Decisions of the United States Merit Systems Protection Board* are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at \$27 for the three-volume set; Stock No. 062-000-00002-3. Covering the period of January 11, 1979, through July 22, 1980, these volumes consist of final actions taken by the Board after the issuance of an initial decision in an appeal from an agency action, Board actions in cases where it has original jurisdiction, and precedential interlocutory actions. In most cases, the preceding initial or recommended decision is included. The cases are indexed in the accompanying multi-part index volume.

INITIAL DECISIONS

Initial decisions made in the regional offices are available on microfiche. The microfiche and its indexes may be viewed at any of the Board's regional offices or in the library at the Board's central office. To subscribe to the microfiche "Federal Employee Appeals Decisions" at \$150 per year for microfiche and index, contact the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

BOARD ORDERS

All Board orders, opinions and indexes may be viewed at the Board's central office. Copies of individual decisions may be obtained by sending a written request to the Office of the Secretary, Room 220, 1717 H Street, NW., Washington, D.C. 20419. Requests should include appellant's name, docket number and date of the decision.

The DIGEST is produced in the Office of the Secretary
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Managing Editor/Designer: Elizabeth Principe
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Office of General Counsel

COMING . . . IN THE SEPTEMBER ISSUE . . .

PUBLICATION OF INDEX TO THE DIGEST

The Merit Systems Protection Board is pleased to announce that the September issue of the *DIGEST* will include a cumulative index. Covering cases summarized in fiscal year 1981 *DIGESTS*, the index will consist of three parts: (1) a list of cases categorized by type of action; (2) an alphabetical list of cases; and (3) a list of cases categorized by agency.

The Board plans to include an index to cases contained in the *DIGEST* as a regular feature in the last issue of each fiscal year.

DEFINITIONS:

These definitions are provided for clarification purposes only and are not intended to convey the strict legal meaning of the term.

Deciding Official—the official who renders the agency's decision.

Regional Office—the Board office authorized to receive appeals from the area where the appellant's duty station was located when the agency action was taken; there are 11 MSPB regional offices.

Initial Decision—the regional office decision made by the presiding official in response to a petition for appeal. The initial decision becomes final in 35 days unless a petition for review is filed with the Board and granted. In that case, the Board's decision becomes the final decision. If the petition for review is denied, the initial decision becomes final five days after the issuance of the denial.

Petition for Appeal—the request filed with a Board regional office for review of an agency action.

Petition for Review—the request filed with the three-member Board in Washington, D.C., for review of an initial decision of a presiding official.

Presiding Official—any person designated by the Board to preside over any hearing or to make a decision on the record. The presiding official referred to in the DIGEST summaries is usually a Board regional office official designated by the Board to perform these duties.

Proposing Official—the agency official who initiates an action to be taken against an employee.

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